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Supreme Court, U.S.
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NO. 02-219

IN THE

Supreme Court of the United States

KIM NETLAND,

Petitioner,

v.

HESS & CLARK, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent does not dispute that there is a conflict in appellate authority on the question presented, but it maintains that the conflict is not deep enough to warrant review. It also contends that review should be denied because the decision below is correct. Respondent is incorrect on both scores.

1. Respondent concedes that two state appellate courts and the D.C. Circuit have held that a state-law damages claim premised on a defendant's failure to warn of a pesticide's dangers is not preempted by FIFRA. Respondent's main argument against review is that a large majority of federal and state rulings on that question are to the contrary, a point that petitioner acknowledges. Pet. 1. However, where, as here, there is an undisputed split in authority, and geographical happenstance dictates the rights of the public and the duties of a regulated industry, this Court has not hesitated to grant review of conflicts even if somewhat lopsided.

That inclination toward review is particularly pronounced in the preemption area. In several recent cases, the Court granted certiorari where the lower federal courts had unanimously found preemption of state-law tort claims, but at least some state courts had taken a different approach. For instance, in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), this Court granted review and held that many of the plaintiff's state-law claims were not preempted by federal tobacco control legislation, despite the unanimity of lower federal court authority holding all claims preempted. *Id.* 508 n.2; *but see id.* at 508 n.3 (citing state court authority finding no preemption). Similarly, in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), the Court granted certiorari and held that the plaintiff's claims were not preempted by the federal medical device law, disagreeing in whole or in part with the views of eight federal circuits. And, next month, the Court will hear *Sprietsma v.*

Mercury Marine, No. 01-706, where review was granted despite the unanimity of federal appellate decisions holding state-law tort claims involving boat propeller injuries preempted by the federal Boat Safety Act. Indeed, in *Sprietsma*, with only one exception — a 1994 Texas Supreme Court decision — all federal and state court appellate decisions had held the state-law claims preempted. *See* Br. for Resp. in Opp. at 17 & n.5, in *Sprietsma v. Mercury Marine*, No. 01-706 (filed Dec. 20, 2001).

In responding to the conflict in authority, respondent takes particular aim at the D.C. Circuit's decision in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), which held that FIFRA does not preempt state-law damages claims. Respondent grudgingly acknowledges that the D.C. Circuit "has not expressly overruled *Ferebee*[.]" Opp. 6. It argues, however, that *Ferebee* has been "discredited" (*id.* at 5) by *Cipollone*, which respondent views as holding that federal preemption of state regulatory law on a particular subject matter necessarily means that state damages actions regarding that subject matter are preempted as well. *Id.* at 6. That argument does not undermine the circuit split; rather, it assumes the answer to the question presented: whether respondent's view of *Cipollone* controls the interpretation of FIFRA's preemption provision or, rather, whether, viewed in the context of FIFRA's text, purpose, and history, Congress rejected that position and left traditional state-law liability systems intact.

In fact, respondent's position equating direct state regulation and state common law is at odds with *Cipollone* itself. To be sure, in interpreting the Public Health Cigarette Smoking Act of 1969, the Court found preemption of some state-law damages claims, relying in part on the notion that such claims can exert regulatory pressure similar to that of direct state regulation. *Cipollone*, 505 U.S. at 521. However, in construing

the preemptive scope of the 1969 Act's predecessor — the Federal Cigarette Labeling and Advertising Act of 1965 — seven members of this Court found *no* preemption of *any* state-law damages actions, despite the Act's preemption of direct state regulation. In so holding, the Court stated that "there is no general, inherent conflict between [express] federal preemption of state [regulatory] warning requirements and the continued vitality of state common-law damages actions[.]" 505 U.S. at 518. That holding effectively embodies petitioner's position that there are significant differences between direct state regulation and state monetary liability and that, depending on the context, Congress may rationally decide to preempt the former while leaving the latter undisturbed. Indeed, this Court has made this point on other occasions as well. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988) ("The effects of direct regulation ... are significantly more intrusive than the incidental effects of such an award provision. ...Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not."); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984).

In sum, the Court should grant the petition to resolve the important issue of federal law that it presents.

2. The petition explains why the ruling below, and the majority position in the lower courts, is inconsistent with FIFRA's text, history, and purpose. Pet. 18-29. Respondent, of course, argues that the ruling below is correct. Opp. 8-17. The opposition, however, ignores key indicators of Congressional and agency intent, including FIFRA's *anti*-preemption provision, 7 U.S.C. § 136v(a), which demonstrates that states may impose liability on manufacturers or even force EPA-approved pesticides off the market provided that they do not regulate the content of the labels themselves, and EPA's acknowledgment

that manufacturers may provide additional cautionary statements on labels to ward off potential state-law damages liability. *See* 49 Fed. Reg. 37,960, 37,971 (Sept. 26, 1984). Nor does respondent confront the fact that FIFRA's voluminous legislative history, drafted against a backdrop of a century of liability for pesticide manufacturer's failures to warn, does not even hint at preemption of state-law damages actions. *See* Pet. 21-22; *see also Silkwood*, 464 U.S. at 251("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by [respondent's tortious] conduct.").

Suffice it to say that the petition and opposition reveal the parties' very different understandings of the law and the significance of EPA pesticide registration. If this Court grants review, there will be time enough to reply to respondent's merits arguments in detail. However, for present purposes, the depth of the disagreement on the merits only emphasizes the need for review.[1]

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[1]Respondent acknowledges that the EPA and the Justice Department's public position on the question presented, in the *Etcheverry* litigation (decided just two years ago), is fully consistent with petitioner's position. Respondent speculates that the government's views may have changed, but it provides no basis for that speculation. *See* Opp. 15. Respondent dismisses the no-preemption position taken by the EPA/Justice Department in *Hart v. Bayer Corp.*, 199 F.3d 239 (5th Cir. 2000), on the ground that the issue there concerned the propriety of removal under the complete preemption doctrine. Opp. 15 n.9. Not quite. Although the plaintiff won the *Hart* appeal on the basis of improper removal, the government also argued that FIFRA does not preempt *any* state-law damages claims. *See* Brief *Amicus Curiae* for the United States in Support of Appellants at 5-9, in *Hart v. Bayer Corp.*, No. 98-60496

(continued...)

3. The opposition does not even mention the court of appeals' ruling on petitioner's design-defect claim and makes no attempt to harmonize what is, in fact, a substantial conflict among the federal and state appellate courts on whether, and in what circumstances, FIFRA expressly preempts such claims. As the petition explains (at 15-18), a grant of review would resolve this issue.[2]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[1](...continued)
(5th Cir. filed March 1999) (lodged with this Court).

[2]The opposition states that petitioner's only challenge to the product itself (as opposed to its labeling) was his expert's "personal" preference for a different active ingredient. Opp. 3. That is not accurate. That expert stated, among other things, that his pesticide company had substituted another chemical for dichlorvos because the new ingredient was safer and more effective, and petitioner submitted scientific evidence linking dichlorvos with petitioner's illness. *See* Pet. 17 n.4, 8, 10 n.2. In any event, the sole question before this Court, and the sole question decided by the court of appeals, was preemption, not whether petitioner's evidence was sufficient to state a design-defect claim under Minnesota law.

Last, respondent argues that FIFRA impliedly preempts petitioner's claims. Opp. 17. Respondent is incorrect for a number of reasons, not the least of which is that, in general, the states are free to enforce their own regulations if they are more stringent than federal law, 7 U.S.C. § 136v(a), and that Congress has given the states primary authority for enforcing FIFRA. *Id.* § 136w-1. In any event, that issue was not decided below and is not fairly included in the question presented, either as formulated in the petition or in the opposition.

Respectfully submitted,

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